

**Summary:** The defendant filed a motion for judgment of acquittal, contending that the guilty verdicts as to counts one and two should be set aside. The Court granted the motion in part, finding that there is insufficient evidence to support the verdict as to count two but sufficient evidence to support the verdict as to the other counts.

**Case Name:** USA v. Kyle Ray DeCoteau

**Case Number:** 4-08-cr-37

**Docket Number:** 93

**Date Filed:** 3/2/10

**Nature of Suit:**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
NORTHWESTERN DIVISION**

United States of America,	)	
	)	
Plaintiff,	)	<b>ORDER GRANTING DEFENDANT'S</b>
	)	<b>MOTION FOR JUDGMENT OF</b>
vs.	)	<b>ACQUITTAL ON COUNT TWO</b>
	)	
Kyle Ray DeCoteau,	)	
	)	Case No. 4:08-cr-037
Defendant.	)	

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Before the Court is the defendant's Motion for Judgment of Acquittal filed on January 27, 2010, pursuant to Rule 29 of the Federal Rules of Criminal Procedure. See Docket No. 81. The government filed responses to the motion on January 29, 2010, and February 26, 2010. See Docket Nos. 83 and 92. For the reasons set forth below, the Court **GRANTS IN PART** the defendant's motion as to count two of the indictment.

**I. BACKGROUND**

On June 3, 2008, the defendant, Kyle DeCoteau, was charged in a four-count indictment with two counts of aggravated sexual abuse of a child, violations of 18 U.S.C. §§ 2241(c) and 1153, and

two counts of abusive sexual contact, violations of 18 U.S.C. §§ 2244(a)(5) and 1153. The sexual conduct allegedly occurred from December 2006 through September 2007. A three-day trial commenced on January 19, 2010, and resulted in a jury verdict of guilty on all four counts.

In count one, DeCoteau is alleged to have engaged in a sexual act with S.S., specifically involving the slight penetration by a finger of the genital opening of S.S. Count two charges DeCoteau with engaging in a sexual act with S.S., specifically alleging contact between the penis and the vulva of S.S. In both instances, it is alleged that S.S. had not attained the age of 12 years at the time of the alleged conduct. Each count carries a 30-year mandatory minimum sentence.

During the trial the government called six witnesses. The first witness was Special Agent Ryan O'Neil of the Federal Bureau of Investigation. Agent O'Neil testified that he was first notified in early March 2008 of an allegation of sexual abuse made in a "Form 960" report. The "Form 960" is a standard report that the State of North Dakota mandates for certain individuals, such as social workers, teachers, etc., to file when any allegations of child abuse are brought to their attention. The report received by Agent O'Neil indicated a child (S.S.), had disclosed that she had been sexually abused by Kyle DeCoteau.

Based upon this disclosure, Agent O'Neil arranged for a forensic interview of S.S. at the Children's Advocacy Center in Minot, North Dakota. The interview took place on March 19, 2008, and resulted in S.S. reporting sexual abuse, and Agent O'Neil identified Kyle DeCoteau as the suspect. DeCoteau was approached and an interview was requested, to which DeCoteau agreed. During the interview DeCoteau admitted, on at least one occasion, to sexually molesting S.S., who would have been approximately seven years of age at the time of the abuse. Agent O'Neil testified that DeCoteau admitted he inserted a finger from his left hand into S.S.'s vagina, had pressed his

penis against her vagina, and indicated that S.S.'s hand was on his penis. At the conclusion of the interview DeCoteau agreed to restate his admissions while being recorded. A redacted copy of that confession was admitted into evidence at trial and was published to the jury.

Sometime after DeCoteau's interview, R.S.L., S.S.'s biological sister, disclosed that she had also been sexually abused by Kyle DeCoteau. Agent O'Neil scheduled a forensic examination of R.S.L., also at the Children's Advocacy Center, for April 24, 2008. R.S.L. was interviewed and reported that she had been sexually abused by Kyle DeCoteau. Agent O'Neil testified that the time frame that DeCoteau admitted to having access to both girls was sometime between January 1, 2007 but before Christmas 2007. During that time frame R.S.L. would have been eleven-years old.

The second witness to take the stand at trial was R.S.L. R.S.L. testified that Kyle DeCoteau sexually abused her one evening as she lay in her parents' bed with her younger sister S.S., and brother W.S., or "J.J." as he is called. She testified that one evening when her Aunt Kelly (Kelly Schroeder) was in the shower, DeCoteau entered the room and reached down and touched her vagina, or "Froggie" as she referred to it, with his bare hand touching her bare skin. She indicated that the abuse did not last very long and ended abruptly as her aunt called out for DeCoteau.

The third witness to testify was S.S. who described where she lived, the school she attended, her current age. S.S. was then asked to recall who lived in her prior residence. Suffice it to say that S.S. had difficulty testifying which resulted in the Government seeking a short recess. During the recess, the government determined that S.S. would be unable to retake the stand without an attendant present. The government moved the Court to allow S.S.'s mother, Karen Schroeder, to take the stand, testify, then return as S.S.'s adult attendant. The motion was granted and arrangements were made to videotape the presence of Karen Schroeder at trial as an attendant.

Karen Schroeder took the stand and testified that the family dynamics were not stable during the time period in question. Schroeder indicated that at times she would leave her husband and S.S.'s biological father (Walter Schroeder), while she engaged in a relationship with another individual. Schroeder also testified during the time period in question she was hospitalized on two separate occasions. During the periods when she was not in the home, S.S. and R.S.L. would be cared for by Walter Schroeder or one of his sisters, Charlene Schroeder or Kelly Schroeder. Kyle DeCoteau was involved in a relationship with Kelly Schroeder and, because of that relationship, Kelly Schroeder would have DeCoteau stay with her at the family residence.

Shortly after Karen Schroeder's testimony S.S. again took the stand. S.S. identified DeCoteau as someone she would have had contact with at the family residence. The government inquired as to S.S.'s ability to understand a "good touch" from a "bad touch." S.S. said she understood the difference between the two and discussed examples of each. Eventually S.S. testified that she had been touched in a bad way. When asked, "Who touched you in a bad way?" she began to cry and could not verbally answer the question. However, S.S. did identify who touched her in a bad way by writing the word Kiele (or close variation thereof) on a sheet of paper. When asked what she wrote on the paper she responded "Kyle." See Docket No. 85 p. 20. After that exchange S.S. was more responsive to the questioning. S.S. said that DeCoteau touched her, with his hand, on the body part in the area below her waist. The following testimony reveals the relevant line of questioning:

Q. When you say that, when you say somebody touched you there, who touched you?

A. Kyle.

Q. Do you know what he touched you with?

A. His hand.

Q. With his hand? S.S., when he touched you with his hand, was it above the clothes or under the clothes?

A. Under.

Q. Okay. So was it his bear (sic) hand on your bear (sic) skin?

A. Yes.

Q. Okay. Do you know the difference between inside and out, S.S?

A. Yes.

Q. So when he touched you in those parts, was it inside or outside?

A. Inside.

Q. S.S., did he just use his hand, or was there any other parts?

A. Just his hand.

Q. Do you know where the --

MR. SCHMIDT: I'm sorry. I didn't hear what she said.

THE COURT: Just his hand.

MR. SCHMIDT: Okay.

Partial Transcript of Jury Trial, Testimony of S.S. See Docket No. 85, p. 27.

Walter Schroeder and Kelly Schroeder testified just prior to the Government's recall of FBI Agent O'Neil. Both individuals confirmed the time frame that Kyle DeCoteau would have had access to both S.S. and R.S.L. Both confirmed that DeCoteau would have, at times, had unsupervised access to both S.S. and R.S.L.

After the government rested, DeCoteau moved for a Rule 29 motion for judgment of acquittal and the motion was denied. The jury deliberated for approximately one full day and ultimately returned a verdict of guilty to each of the four counts in the indictment.

Counsel for DeCoteau contends that as to count one, the only evidence relating to the elements of the offense was the tape-recorded interview of DeCoteau which occurred in March 2008, and the testimony of S.S. DeCoteau argues that the testimony of S.S. did not establish that the sexual act included digital penetration of the genital area of S.S. Rather, the testimony of S.S. simply indicated that DeCoteau placed his hand inside the clothing of S.S. Thus, the “admission” of DeCoteau was uncorroborated.

With regard to count two of the indictment, DeCoteau argues that the only evidence of possible contact between DeCoteau’s penis and the vulva of S.S. was in the recorded statement taken from DeCoteau in March 2008. In her trial testimony, S.S. clearly indicated that the only contact DeCoteau had with her was with his hand and only on the inside of her clothing.

## **II. LEGAL DISCUSSION**

It is well-established that before granting a motion of acquittal, a court must first determine whether “the evidence, viewed in the light most favorable to the government, is such that a reasonably minded jury must have a reasonable doubt as to the existence of any essential elements of the crime charged.” United States v. Robbins, 21 F.3d 297, 298-99 (8th Cir. 1994) (quoting United States v. Mundt, 846 F.2d 1157, 1158) (8th Cir. 1988). A court should grant a motion for acquittal if, after reviewing all the evidence in the light most favorable to the verdict with every logical inference drawn in the government’s favor, the court finds there is insufficient evidence to

support the verdict. United States v. Aguilar-Portillo, 334 F.3d 744, 747 (8th Cir. 2003).

The government is given the benefit of reasonable inferences so long as they are not the result of conjecture or speculation. United States v. Boesen, 491 F.3d 852, 858 (8th Cir. 2007). When reviewing the sufficiency of the evidence to support a conviction, the “conviction must be supported by substantial evidence and cannot be based on mere suspicion or possibility of guilt.” United States v. Robinson, 782 F.2d 128, 129 (8th Cir. 1986). In addition:

Where the Government’s evidence is equally strong to infer innocence as to infer guilt, the verdict must be one of not guilty and the court has a duty to direct an acquittal. In determining the strength of the evidence in a circumstantial case, it is the totality of the circumstances that must be weighed in making a decision on a motion for acquittal.

United States v. Davis 103 F.3d 660, 667 (8th Cir. 1996) (internal citations omitted).

In count one of the indictment, DeCoteau was charged with aggravated sexual abuse of a child, a violation of 18 U.S.C. §§ 2241(c) and 1153. 18 U.S.C. § 2246(2) defines the term “sexual act” to include:

(C) The penetration, however slight, of the anal or genital opening of another by a hand or finger or any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

The United States Supreme Court in Wong Sun v. United States, 371 U.S. 471 (1963), held that it is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused. The court noted that the requirement of corroboration is rooted in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. The Court further stated:

In our country the doubt persists that the zeal of the agencies of prosecution to protect

the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession. Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial. They had neither the compulsion of the oath nor the test of cross examination.

Id. at 489 (quoting Opper v. United States, 348 U.S. 84, 89-90 (1954)).

Recently, the Eighth Circuit Court of Appeals in United States v. Soltani, 2010 U.S. App. LEXIS 508 (No. 08-3731, 8th Cir. January 11, 2010) (unpublished), reaffirmed this holding by recognizing that a conviction must rest upon firmer ground than the uncorroborated (extra judicial) admission or confession of the accused.

The Court finds that the corroboration requirement is satisfied as to count one of the indictment because there is substantial independent evidence (the testimony of S.S.) which tends to support the essential facts and justifies a reasonable inference that DeCoteau's hand touched or contacted S.S. in the vulva on the "inside." The victim's testimony at trial revealed that DeCoteau touched her body part below her waist with his bare hand to her bare skin, and that the touch was on the "inside." The questioning pursued by the government at trial on this subject matter is vague and unclear. See Docket No. 85, pp. 26-27. Whether the question pertaining to touching "inside" means inside (or under) the clothing or whether the question means inside the body, i.e., penetration, is somewhat vague. The line of questioning from the AUSA started with a specific question pertaining to touching "above the clothes or under the clothes" and then followed up with a question pertaining to touching "inside or outside." The inference can be drawn that the final question from the AUSA related to whether penetration had occurred. That is a reasonable inference the jury could draw based on the totality of the evidence – and such an inference would not be based on



speculation. However, the questions propounded and the responses of the victim are not a model of clarity.

It is well-established that the government is to be given the benefit of reasonable inferences so long as such inferences are not based on conjecture or speculation. Here, the jury had the benefit of hearing live testimony from the victim (S.S.), listening to the other fact witnesses describe the dysfunctional home environment where the alleged abuse occurred, and assessing the victim's credibility. In viewing the evidence in a light most favorable to the government, and with every logical and reasonable inference drawn in the government's favor, the Court finds there is sufficient evidence to support the verdict as to count one.

With respect to count two of the indictment (aggravated sexual abuse), this count alleges that the sexual act involved contact between DeCoteau's penis and the vulva of S.S. The only evidence regarding the commission of this offense is DeCoteau's March 2008 admission. There is no direct or circumstantial evidence which supports or corroborates DeCoteau's statement. The trial transcript reveals that S.S. testified that the only contact DeCoteau ever had with her was with his hand inside her clothing. No other corroborating evidence was presented at trial which suggests or even infers that contact occurred between DeCoteau's penis and S.S.'s vulva.

The government contends there was evidence presented that DeCoteau had access to both young victims and the Court agrees with that proposition. However, the record is devoid of any evidence which establishes or even infers that having access resulted in sexual contact between the penis and the vulva. The government has failed to identify any evidence in the record which corroborates that there was contact between the penis and the vulva. See 18 U.S.C. § 2246(2)(A). Absent any independent corroboration, the defendant's statement, standing alone, cannot justify the

verdict as to count two.

After reviewing all of the evidence in a light most favorable to the verdict, and with every logical inference drawn in the government's favor, the Court finds there is insufficient evidence to support the verdict as to count two of the indictment. The mere fact the defendant had access to the victim(s) in the home does not corroborate that a sexual act occurred involving contact between the penis and the vulva, particularly when the victim expressly testified that the defendant only touched her with his hand.

For the reasons set forth above, and in the interests of justice, the Court **GRANTS IN PART** the defendant's Rule 29 motion for judgment of acquittal (Docket No. 81) but only as to count two of the indictment. The jury verdict of guilty as to count two is set aside and dismissed pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure. The jury verdict of guilty as to counts one (aggravated sexual abuse), three, and four (abusive sexual contact) remain as there is sufficient evidence to support the verdict as to each of those three counts.

Dated this 2nd day of March, 2010.

/s/ Daniel L. Hovland

Daniel L. Hovland, District Judge  
United States District Court